No. 83-317

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SHERMAN BLOCK, *et al.*,

Petitioners,

v.

DENNIS RUTHERFORD, HAROLD TAYLOR, RICHARD ORR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Narrowly Tailored Contact Visitation Approved by the Court of Appeals to Prevent Impermissible Punishment of a Limited Number of Long-Term, Low-Risk PreTrial Detainees, and to Preserve the Constitutionally Protected Familial Rights of those Detainees and their Parents, Spouses and Children is Clearly Erroneous in the Context of the Totality of Conditions at the Los Angeles County Jail?

2. Whether the Ordered Cell Search Procedure, Initially Designed by Jail Officials, Approved by the Court of Appeals was an Appropriate Remedy to Prevent Deprivation of Prisoners' Property without Due Process of Law?

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The opinion of the United States Court of Appeals for the Ninth Circuit (PA 1) is now reported at 710 F.2d 572 (9th Cir. 1983). All other opinions below are correctly cited in Petitioners' brief at 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to those contained in Petitioners' brief at 1, the following statutory provisions are involved in this case:

California Penal Code

§ 2600. Deprivation of rights relating to security of institution and protection of public.

A person sentenced to imprisonment in a state prison may, during any such period of confinement, be deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public.

§ 2601. Retention of Rights.

Notwithstanding any other provisions of law, each such person shall have the following civil rights:

* * *

(d) To have personal visits; provided that the department may provide such restrictions as are necessary for the reasonable security of the institution.

California Administrative Code, Title 15

§ 3170. General Visiting Policy.

* * *

(d) Devices which do not allow physical contact between inmates and visitors will not be used except as is necessary in individual instances where substantial reasons exist to believe that physical contact with a visitor, visitors or with other inmates will seriously endanger the safety of persons or the

security of the institution, or as a temporary measure as punishment for willful failure or refusal to abide by regulations related to visiting.

§ 3287. Cell, Property and Body Inspections.

(a) . . . * * *

(3) An inmate's presence is not required during routine inspections of living quarters and property when the inmate is or would not otherwise be present. During special inspections or searches initiated because the inmate is suspected of having a specific item or items of contraband in his or her quarters or property, the inmate should be permitted to observe the search when it is reasonably possible and safe to do so.

STATEMENT OF THE CASE

1. Procedural History

We adopt the procedural history set forth in Petitioners' opening brief with the following clarifications and additions.

This class action was certified as containing two subclasses, the first consisting of pretrial detainees and the second consisting of sentenced prisoners (J.A. 51). On the eve of trial, detainees comprised approximately sixty-five percent of the Jail's population (J.A. 59), and during the course of trial that percentage increased significantly in accordance with the Sheriff's plan to phase out sentenced prisoners (R.T. 13:3241, 21:4462, 4536).

The district court proceeded quite cautiously in this matter, providing defendants with every opportunity to convince the court that injunctive relief was unnecessary, inappropriate, or inequitable. After a 17-day trial, two inspections of the Jail, and extensive briefing by both sides (P.A. 42), the court issued a Memorandum Decision (P.A. 41), containing its tentative determinations, identifying ten substantive areas ostensibly requiring injunctive relief—crowding, visitation, outdoor recreation, indoor recreation, windows, processing for court, telephones, cell searches, time for meals, and clothing—

inviting further explanation from the defendants as to why an injunction should not issue.

In response to defendants' motion for reconsideration the court held four days of post-trial hearings (J.A. 3; P.A.29), at which defendants presented evidence to convince the court to abandon its tentative conclusions on four specific issues—contact visitation, restoration of windows, cell search procedures, and obstructions on one of the Jail's rooftop recreation areas. The district court took the matter under submission and eventually issued its Supplemental Memorandum Decision (P.A. 29), in which the court reversed itself on the constitutional necessity for removing obstructions on the roof recreation area, modified its ruling on contact visitation by further restricting eligibility to low-risk detainees incarcerated 30 days or longer (as compared to 40 days or longer in its original Memorandum of Decision), adopted a method of searching cells developed and demonstrated by defendants, and reaffirmed its earlier conclusion that existing window openings must be uncovered. After yet further argument, the court issued its initial judgment on February 15, 1979 (P.A. 37).[1]

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[1] The judgment contains twelve injunctive provisions, nine of which defendants have accepted, to wit, enjoining defendants to provide every prisoner with a bed, to allow visits by unescorted minor children, to permit outdoor recreation, to install television sets, to provide all detainees going to court with seating in Jail holding cells, to wake up detainees going to trial not earlier than 6 a.m. and return such detainees to their cells not later than 8 p.m., to install telephones, to afford inmates not less than fifteen minutes to eat their meals, and to provide prisoners with a change of clothing at least twice a week.

The district court declined to issue orders as to other conditions which, although deleterious, did not in the court's view rise to the constitutional deprivation which called for court intervention. For example, it denied injunctive relief against overcrowding even though defendants allowed less than 25 feet of floor space per man, an amount far less than the 40 square feet prescribed by California

2. Statement Of Facts

The two challenged orders must be considered in the context of certain pervasive facts. First, the deprivations challenged in this action are suffered by detainees for extensive periods of time. Although there is rapid turnover of short-term prisoners, a very substantial percentage of the Jail's pretrial population is a relatively stable group which spends months in the Jail pending resolution of criminal charges. This fact was revealed by the testimony of Lt. Thomas Lonergan, a key witness from the Sheriff's Department, who testified that: very conservatively 75% of the Jail's pretrial detainees are accused of felonies (R.T. 21:4463)[2]; three to four months are required to process felony charges in Los Angeles County courts (R.T. 21:4537); on October 24, 1978, the Jail held 2,864 pretrial detainees who had been in custody more than 15 days (R.T. 21:4465); and in the universe of pretrial detainees both booked

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Minimum Jail Standards and a number of cases (P.A. 45-47) and the generally accepted minimum standard of 50 square feet (P.A. 46). The Court also refused to enjoin a practice whereby, under certain circumstances, detainees were required to sleep on the floor for one night. (P.A. 37-38). It permitted an outdoor recreation schedule of only 2½ hours per week, conceding that this is considerably less than what several other courts have required. (P.A. 50-51). It declined to require the dismantling of a structural obstruction on the rooftop recreation area which severely interfered with recreation (P.A. 52). It refused greater access to law library facilities (P.A. 63). It denied brutality claims (P.A. 64). Even as to violations of the order the court had made, it required the inmates to exhaust an administrative procedure before it would entertain any application for contempt (P.A. 40-41).

[2] Due to idiosyncrasies of the Jail's computer system, a detainee accused of both a felony and a misdemeanor might be reflected as a misdemeanant if he is next scheduled to appear in court on the misdemeanor (R.T. 21:4463).

and released during 1977, 1,290 were held more than 180 days and 4,798 were held between 61 and 180 days (R.T. 21:4466-7).[3]

Second, the Central Jail is the most populous penal facility in the country. Its rated capacity, 5,548 (J.A. 59), is larger than that of any other correctional institution[4] and almost twice that of the next largest jail (R.T. 20:4194).[5]

A. Contact Visits

On the question of contact visitation, the relevant findings of the district court,[6] contained in its Memorandum Decision (P.A. 41), Supplemental Memorandum Decision (P.A. 29) and Memorandum Decision (after remand) (P.A. 23) are as follows:

1. The ability to embrace wives and children "is a matter of great importance" to pretrial detainees confined for long periods of time (P.A. 48, P.A. 32-33); and the deprivation of contact visits to such detainees is "very traumatic treatment" (P.A. 25);

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[3] Obviously, these last two statistics minimize the number of persons experiencing lengthy confinement since they do not include persons booked before 1977 who were released in 1977 or a later year (R.T. 21:4534) and the chances of being omitted from defendants' data for 1977 increase with the length of confinement. For example, plaintiffs Rutherford, Taylor and Armstrong were pretrial detainees for 39 months, 33 months and 15 months, respectively (J.A. 53).

[4] The second most populous correctional institution, Jackson State Prison in Michigan with a rated capacity of 5,000 occupies a much larger area than the Jail (R.T. 20:4194-5).

[5] The Cook County, Illinois jail has a rated capacity of 2,800; and the largest jail in New York City has a rated capacity of 2,300 (R.T. 20:4194).

[6] Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness. Rule 52(a), Federal Rules of Civil Procedure; *Studiengesellschaft Kohle* v. *Eastman Kodak Co.*, 616 F.2d 1315 (5th Cir. 1980), *cert.den.*, 449 U.S. 1014 (1980).

2. Defendants' "categorical rejection of all proposals involving any such visits" is an "overreaction" stemming from "an unreasonable fixation upon security" (P.A. 25-26);

3. Problems posed by contact visits are rendered manageable by limiting the number and frequency of such visits and by limiting eligibility for such visits to low security risk prisoners (P.A. 26; P.A. 33);

4. Defendants are able to conduct and have implemented a classification system to evaluate pretrial detainees regarding their propensities for escape and drug abuse (P.A. 48);

5. A substantial number of pretrial detainees receive low risk classifications from defendants (P.A. 48);

6. Defendants have a great deal of information about pretrial detainees incarcerated one month or more derived from their classification system, investigation, and opportunity to observe (P.A. 33);

7. Danger to jail security posed by according contact visits to low-risk pretrial detainees is insufficient to justify depriving them of all physical contact with their loved ones for extensive periods of time. (P.A. 32, 48);

8. Defendants have the means, such as supervision during visitation and strip searches after visitation, to maintain jail security during contact visitation (P.A. 48, 49); and

9. Massive construction is not necessary to accommodate physical contact visitation limited to non-high security detainees held one month or more and to a maximum of 1,500 visits per week (P.A. 33).

Evidence in the record amply sustains these findings. The eight corrections experts who testified for both plaintiffs and defendants on this issue took varying approaches; but at the bottom line the testimony of each reveals that the benefits of contact visitation considerably outweigh the risks and that it is more than feasible in this particular facility.

On the question of the importance of contact visitation to prisoners' spiritual and emotional health, William Nagel, a distinguished corrections expert from Philadelphia, testified that contact visitation was highly beneficial to both prisoners and institutions by engendering some sense of normalcy, facilitating family relationships and generally reducing tensions (R.T. 21:4174-6). In his words, visitation is "the most important single experience" in an inmate's prison life and is the time when he acts "in his highest humanness" (R.T. 21:4168).

Elaborating on this theme, Dr. Terry Kupers, a psychiatrist, testified that contact visitation is crucial for the maintenance of prisoners' mental health, decreasing their anxiety and disorientation (R.T. 22:4647-9). Although the absence of contact visitation may not, in itself, cause mental illness, the frustration and alienation inherent in barrier visitation is clearly detrimental to mental health and may be a contributing factor in a prisoners' mental breakdown (R.T. 22:46, 47, 49-50). The stress caused by the absence of physical touching during visits increases with the length of incarceration (R.T. 22:4663-4). The lack of contact visitation is a significant factor in causing the break-up of marriages (R.T. 22:4651). Dr. Kupers based his testimony on clinical interviews of exprisoners, including those who have been in the Central Jail and his knowledge of literature on social deprivation (R.T. 22:4647-8). He also indicated that a California Department of Health Task Force, including the Los Angeles County Jail's Chief Physician, Dr. Armon Toomajian, was unanimous that prisoners should be allowed physical contact visitation (R.T. 22:4648).[7]

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[7] Defendants' medical expert, Los Angeles County Jail psychiatrist Donald Verin conceded upon examination by the court that the therapeutic value to a detainee of being able to kiss his wife and fondle his children "can be important," and opposed contact visiting primarily upon his analysis of security concerns which were outside the scope of his expertise. R.T. 21:4507.

Defendants' expert George Sumner, the Warden of San Quentin Prison, conceded the need for contact visitation in testifying that visitation is "very necessary," that it encourages proper inmate behavior and that it assists inmates' reintegration into society (R.T. 22:4624).

Expert testimony at trial further reflects the punitive nature of denying contact visitation. Mr. Nagel testified that even in prisons the denial of contact visitation is rare (R.T. 20:4160), a fact confirmed by San Quentin Warden George Sumner (R.T. 22:4600, 4632-3), and by Lloyd Patterson, the former superintendent of Deuel Vocational Institute (DVI) (R.T. 22:4571-3). More importantly, Mr. Nagel testifed that in most prison inmates are assumed capable of handling contact visitation. It is only when a particular prisoner violates the visiting space itself that contact visitation privileges are withdrawn as a form of punishment (R.T. 20:4160).

Mr. Patterson and Mr. Sumner similarly testified that withdrawal of contact visitation was a potent disciplinary measure within their respective prisons because prisoners exercised self-control in order to preserve their prized visitation privileges (R.T. 22:4588-9, 4624).

An abundance of evidence in the record establishes that a contact visitation program can be conducted without jeopardizing institutional security. Expert testimony revealed the existence of a variety of adequate and tested security precautions, available to the defendants to provide for contact visitation, including: creation of a secure area serviced by two sally ports, one for use by prisoners and one for use by visitors; searches of prisoners before and after visits; dressing of prisoners in separate garments for visits; metal detectors and flouroscopes used on prisoners and visitors; rejection or storage of visitors' parcels; rejection of visitors who refuse to comply with security procedures; searches of visitors who refuse to comply with security procedures; observation of the visiting area by officers; and classification of prisoners. (Nagel, R.T. 20:4164-6, 4232; Patterson, R.T. 22:4575-7, 4854-5; Sum-

ner, R.T. 22:4601; Pierce, R.T. 5:1980-2, 1989-90). Mr. Nagel testified that the use of these security devices "will prevent everything except the most extreme methods of introducing drugs into the institution" (R.T. 20:4170). Mr. Patterson indicated that during his 11 years at DVI, his staff did not discern one weapon being smuggled into the institution through the visiting area (R.T. 22:4587-8), and only three or four incidents occurred in that area (R.T. 22:4589). And Arnett Gaston, Warden of New York City's Men's House of Detention, testified that significant physical confrontations such as those which defendants predicted would flow from contact visitation have largely been absent from his facility (R.T. 20:4368).

The record demonstrates that some influx of narcotics is endemic to penal facilities and that defendants overstate the contraband problem posed by contact visitation. Mr. Nagel stated that in his opinion, based on 11 years' experience in the New Jersey prison system (R.T. 20:4154) and his visits to more than 350 penal institutions (R.T. 20:4157-8), misconduct during contact visitation was unusual due to the importance of such visitation to prisoners (R.T. 20:4168). Although narcotics may be brought into an institution through contact visitation, there are other, more significant sources of contraband, including commerce with the institution, smuggling by employees (R.T. 20:4172-3) and "drops" picked up by trusties working outside of the institution (R.T. 20:4177-8). Correctional administrators often express concern regarding the passage of narcotics in balloons during visitation, yet the frequency of the use of such method is unknown (R.T. 20:4251). Mr. Patterson and Mr. Sumner similarly testified that contraband enters their facilities through a variety of means other than contact visitation and would continue to enter without such visitation (R.T. 22:4589-90, 4624-5). In this regard, defendants, themselves, admit that the Jail currently has a contraband problem although they prohibit personal contact visitation (see, e.g., R.T. 13:3307, 21:4526-7).

Further, the evidence shows that contact visitation is the norm in facilities for convicted prisoners and is expanding

rapidly within local detention facilities. Mr. Nagel testified that contact visitation is "(t)he prevailing practice" for convicted offenders and that there is "considerable movement" toward contact visitation in jails (R.T. 20:4158). Mr. Nagel further testified that professional standards established by the National Sheriff's Association and the American Correctional Association called for contact visitation in jails (R.T. 20:4189). Mr. Nagel also pointed out an irony in the current disparity between visitation practices in prisons and jails: prisons uniformly allow contact visitation to the vast majority of their inmates, yet such inmates have far greater incentive to import contraband into their facilities and have much greater time to scheme to effect such importation (R.T. 20:4159-60, 4173).

In the aggregate, the testimony of Messrs. Patterson, Sumner and Pierce establishes beyond question that in the California prison system contact visitation is the rule. Mr. Patterson testified that at DVI, a facility housing the California prisons system's most difficult inmates—younger offenders accused of violent and aggravated offenses (R.T. 22:4571)—the only screening[8] with regard to contact visitation is a short review done by a captain the day of each prisoner's arrival and thereafter 75% of the new prisoners are immediately permitted contact visitation (R.T. 22:4585).[9] Mr. Patterson further testified that in the California prison system as a whole about 80% of the inmates are allowed contact visitation (R.T. 22:4587).[10] Mr.

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[8] No classification as to contact visitation *per se* is done at the California prison system's reception centers prior to transfer to permanent facilities such as DVI (R.T. 22:4586).

[9] Among the 25% denied contact visitation at DVI were protective custody prisoners, i.e., prisoners needing protection from their fellows, who did not receive such visitation because the wing in which they were housed was not constructed to permit it (R.T. 22:4581-2).

[10] This practice apparently results from recent actions of the California Legislature. California Penal Code, Sections 2600 and 2601 state generally that prisoners serving a state prison sentence retain

Sumner testified that about 84% of San Quentin's population (R.T. 22:4600, 4632-3) is allowed contact visitation within one week of arrival (R.T. 22:4632). William Pierce testified that at the California Department of Corrections Southern Reception Center, an entry point for new commitments to the state prison system, within 7 to 10 days of their arrival many inmates are assigned to Reception Center West, a temporary holding facility, and are thereafter allowed contact visitation (R.T. 5:1980-2, 1989-90).

Similarly, the testimony of Walter Lumpkin, the warden of the Federal Metropolitan Correctional Center in San Diego (Deposition [in evidence] 7-8, 14-16), and Lt. Bobby Creek of the Federal Correctional Institution at Terminal Island (R.T. 5:1955) reveals that it is the policy of the Federal Bureau of Prisons to allow contact visitation to pretrial detainees and convicts, alike.

In New York City, according to Mr. Gaston, the Department of Corrections has voluntarily expanded contact visitation to all of its facilities and from one to three hours each week for each prisoner (R.T. 20:4362-3).

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certain civil rights including the right "to have personal visits." Pursuant to state law, the California Director of Corrections has promulgated regulations which are codified in California Administrative Code, Title 15, and Section 3170(d) of the Code expressly prohibits "Devices which do not allow physical contact between inmates and visitors . . ." except in certain circumstances. Most recently, the California Supreme Court held that the above sections of the Penal Code "apply . . . not only to state prisoners but also to those merely detained pending trial" and that "these provisions . . . are equally binding upon county jail authorities." (footnote omitted). *DeLancie* v. *Superior Court, etc.*, 31 Cal.3d 865, 872, 183 Cal.Rptr. 866, 870, 647 P.2d 142 (1982). Although the *DeLancie* court noted the relevance of the California Administrative Code to their inquiry, *id.*, 31 Cal.3d at 874, 183 Cal.Rptr. at 872, the question of its binding application to detainees is apparently open.

Finally, the district court had before it expert opinion that contact visitation is specifically feasible at the Central jail. Mr. Nagel testified that contact visitation would be possible with the use of security procedures described earlier in his testimony (R.T. 20:4164-6) and with some structural alterations, namely the creation of a separate visitation building that could be constructed on top of the adjacent parking structure (R.T. 20:4186-7). Likewise, Mr. Patterson opined that contact visitation could be safely allowed at the Central Jail. He suggested that a secure visitation area could be created with minor structural modifications in the current visiting lobby (R.T. 22:4595) and that that "a large percentage" of the Jail's detainees could be readily cleared for contact visitation by using Criminal Identification Investigation rap sheets, police reports and interview, always resolving any doubt by denying contact visitation—at least until further information is received (R.T. 22:4593-4).

The testimony of the Sheriff's Department's own in-house correctional expert, Lt. Lonergan (R.T. 16:3746), supports the view that only the availability of an appropriate facility stands in the way of contact visitation. Although Lt. Lonergan testified that there are two principal obstacles to such visitation, namely the lack of a facility and a speedier prisoner identification system (R.T. 21:4531-2), his earlier statement that 70% of the Jail's detainees are identified in three weeks (21:4450-51)[11] and his admission that defendants have the know-how to conduct a psychological profile (R.T. 21:4532) belie the significance of classification as a problem.

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[11] The apparent contradiction between Lt. Lonergan's statements that 70% of the detainee population is identified within three weeks, and his mention of the need for faster classification may in part be explained by the fact that at the time of his testimony the district court's original Memorandum Decision indicated that detainees held two weeks or more should receive contact visitation. (P.A. 49).

The district court, after careful consideration of the full record, held that

> [I]f a man is incarcerated in the jail for more than a few weeks, principles of basic human decency require that all reasonable attempts be made to permit him to kiss his wife or his girlfriend and to hug his child once in a while during this long, difficult and inherently depressing period in his life.

(P.A. 32). The court accordingly entered a limited order affording one contact visit per week, but only to those detainees who had been classified as low-risk, and only to those low-risk detainees who had been in the jail a month or longer. The court also (i) limited the number of contact visits at the jail to 1,500 per week, (ii) allowed defendants to provide less than one contact visit per week to eligible prisoners if doing so would require defendants to exceed the 1,500 per week limit, and (iii) left the length of each contact visit in the total discretion of the Sheriff (P.A. 38).

On appeal, the Ninth Circuit expressly affirmed the district court's findings as to "the adverse psychological effects caused by the lack of physical contact with family members over a prolonged period of time." (P.A. 5), 710 F.2d at 575. The Court of Appeals agreed with Judge Gray that the denial of all physical contact with loved ones is "an unreasonable and exaggerated response by the county for those detainees who spend more than thirty days in the facility and who can be identified as low-risk detainees." (P.A. 5-6), 710 F.2d at 575-76. While readily agreeing with the defendants that "contact visitation is not constitutionally mandated for all detainees in all facilities," (P.A. 8), 710 F.2d at 577, the Court of Appeals recognized "the psychological and punitive effects which the prolonged loss of contact visitation has upon detainees, who have not yet been convicted of any crime," *id.*, and concluded that "[a] *blanket* restriction on contact visits for *all* detainees may present an unreasonable, exaggerated response to security concerns at a particular facility." *Id.* (emphasis added). Accordingly, the district court's narrow and carefully limited contact visitation order was unanimously affirmed.

B. Observation Of Cell Searches

On the question of exclusion of pretrial detainees from the area of their cells during searches, the district court's findings are as follows:

1. Permitting pretrial detainees to observe searches of their cells would provide them with their only opportunity to explain, protest or entreat against arbitrary confiscation of their meager but cherished possessions under subjectively enforced regulation (P.A. 61; P.A. 36; P.A. 38);

2. A cell search method designed by petitioner known as Method C, which permits pretrial detainees present to observe searches of their cells is an efficacious means of conducting such searches while protecting prisoners' interest in their property (P.A. 36; P.A. 27).

This order is supported by an abundance of testimony by both prisoners and deputy sheriffs indicating that the speed with which prisoners' cells are searched invariably leads to significant disruption, confiscation and/or destruction of property. Inmates variously testified that during so-called "shakedowns" their cells are "completely destroyed," "like you would take a giant beater and go into the cells and just stir it up" (R.T. 6:2236), "[a]ll your personal property was thrown all over the floor, scattered all around" (R.T. 7:2388), and everything was left "in a pile in the center of the cell" (R.T. 5:2022). On the other hand, deputies who testified acknowledged that they were forced to rapidly search cell-rows, each containing 13 four or six man cells (J.A. 68, 72), and did not have the opportunity to be neat (see, R.T. 1:1116, 3:1632, 4:1967, 10:2861-3, 10:2871, 11:2909, 11:2948-9, 11:3021, 3031).[12]

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[12] The testimony of Jail officers was highlighted by the candor of Deputy Sheriff Rollie McEntire, who indicated that his nickname in the Jail was "The White Tornado" because in searching prisoners' cells he would leave property "a little messy" (R.T. 11:2948-9).

The order is also based on the court's direct observation of various cell search procedures demonstrated by petitioners and most specifically its observation of the interaction between a prisoner permitted to observe the search of his cell and searching deputies (P.A. 36). The Court's "significant generalization" derived from its view (P.A. 25), that the presence of prisoners was an effective way of ameliorating deprivations of property occurring during searches is sustained by prisoner testimony at the original trial and by expert testimony.

Mr. Nagel testified that it is desirable to conduct cell searches in the presence of inmates so that prisoners' suspicions that they are being deprived of their meager possessions without due process of law will be allayed (R.T. 20:4201-2). He stated that such a procedure is feasible (R.T. 20:4202), and that denying inmates the opportunity to observe searches of their cells when possible "adds to the whole atmosphere of suspicion in the institution" (R.T. 20:4201).

Petitioners opposed judicial imposition of "Method C" with conjecture over security concerns, especially that an officer conducting searches on a top tier could fall to the tier below, and that prisoners preferred not to observe searches of their cells (R.T. 19:4132-3), but presented no convincing evidence that these or other evils would actually occur.[13]

In light of this evidence, and the fact that petitioners themselves voluntarily designed the search procedure eventually

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[13] Mr. Sumner's brief testimony regarding the difficulties of allowing prisoners to observe cell searches was based solely upon his experiences in the high security unit at San Quentin (R.T. 22:4633). Furthermore, a recently promulgated California Department of Corrections regulation, codified at 15 Cal. Admin. Code § 3287(a)(3), demonstrates that Mr. Sumner's employer endorses such prisoner observation. And the application of that regulation to detainees is apparently an open question under state law. See, *DeLancie* v. *Superior Court, etc., supra* and n.10, *supra*.

ordered (R.T. 19:4115-6), the court concluded that detainees' interests in fair treatment regarding their possessions demanded protection and could reasonably be accommodated through their presence without jeopardizing Jail security.

SUMMARY OF ARGUMENT

In this case, officials of Los Angeles County ask the Court to review two narrowly drawn orders of the trial court, both of which were affirmed by the Court of Appeals.

I. Contact Visits

The trial court entered a limited order affording one contact visit per week, but only to those detainees who had been classified as low-risk, and only to those low-risk detainees who had been in the jail a month or longer. The court also limited the total number of contact visits at the jail each week and left the length of each visit to the total discretion of the Sheriff.

The lower courts carefully followed the teaching of *Bell* v. *Wolfish*, 441 U.S. 520 (1979), and determined that the total prohibition of contact visits constituted impermissible punishment in violation of the Due Process Clause. The trial court, after noting the different overall conditions in this older, overcrowded jail as compared to the new facility in *Wolfish*, found that the total prohibition of contact visits constituted genuine privations and hardship over extended periods of time and was an exaggerated, punitive response by the jail officials which required judicial relief. In the light of the specific findings by the trial court that the officials' actions were excessive in relation to the alternative purpose assigned and resulted in punishment, combined with the other aggravating conditions at this Jail, the challenged order is a minimal intrusion carefully selected and designed to alleviate the excessive deprivations suffered by these detainees.

In addition, the trial court found that the total prohibition of contact visitation seriously impeded the familial rights of detainees and their visitors causing trauma and pain. In *Wolfish*

the Court specifically noted that it was not dealing with fundamental liberty interests established by a long line of cases. See, e.g., *Griswold* v. *Connecticut*, 381 U.S. 479, 496 (1965). This case does deal with the very fundamental interests alluded to in *Wolfish*, 441 U.S. at 534-35, and must be accorded "shelter under the Fourteenth Amendment's Due Process Clause," *Moore* v. *City of East Cleveland*, 431 U.S. 494, 500-01 (1977).

The Court in *Wolfish* noted that where other constitutional rights, such as those under the First Amendment, were implicated, the analysis must go beyond merely looking for punishment. *Wolfish* at 549-53. Because there are fundamental familial rights involved in this case, the Court is required to entertain a more careful scrutiny of the balance between the interests involved. *Procunier* v. *Martinez*, 416 U.S. 396 (1974). Thus, the complete elimination of all opportunity for all detainees to touch their loved ones, especially infant children, is obviously "greater than is necessary or essential to the protection of the governmental interest involved." *Procunier* at 413.

II. Observation Of Cell Searches.

The trial court's order required that detainees present in the vicinity of their cellblock be given the opportunity to observe searches of their cells and property, a method chosen especially by the jail officials as one of a number of alternative plans. The petitioners rely solely on this Court's holding in *Wolfish* that the right to observe searches of their cells does not violate an inmate's rights under the Fourth Amendment.

The holding in *Wolfish*, however, is not dispositive of that issue in this case because it is clear that the trial court was concerned that detainees not be deprived of their property without due process of law. This Court in *Wolfish* never considered the cell search issue in the context of infringing on a detainee's due process rights and, in the light of the limited order in this case, the limited holding of *Wolfish* is inapposite.

Moreover, in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), this Court, after *Wolfish*, indicated that due process guarantees apply to the taking or destruction of a prisoner's property and that a hearing is required before the state deprives a prisoner of his property interests. In this case, the trial court did not enjoin the officials' cell search procedure as unconstitutional *per se* but rather as being actually conducted in a manner abusive to detainees' property rights and the limited holding of *Wolfish* does not control the resolution of the precise issues at bar.

ARGUMENT

I. TOTAL PROHIBITION OF CONTACT VISITATION AT THE LOS ANGELES COUNTY JAIL CONSTITUTES IMPERMISSIBLE PUNISHMENT OF UNCONVICTED PRETRIAL DETAINEES IN VIOLATION OF THEIR RIGHTS UNDER THE DUE PROCESS CLAUSE.

A. The Due Process Clause Prohibits Punishment Of Pretrial Detainees.

In *Bell* v. *Wolfish*, 441 U.S. 520 (1979), this Court held that unconvicted pretrial detainees may not be subjected to punishment or to conditions of confinement which amount to punishment:

> In evaluating the constitutionality of conditions or restrictions of pretrial detention . . . we think that the proper inquiry is whether those conditions *amount to punishment* of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. . . . [T]he Government . . . may detain him to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility *so long as those conditions and restrictions do not amount to punishment*. . .

Id. at 535-37 (emphasis added). The Court further declared that detainees need not prove an express intent to punish in order to prevail under this standard. Even if a non-punitive purpose is the cause of a particular restriction, it may constitute punishment if it "appears excessive in relation to the

alternative purpose assigned [to it]." *Id.* at 538, quoting *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 169 (1963). If a detainee can prove that a particular restriction is in fact an "exaggerated response" to the legitimate needs of jail officials, that restriction is unconstitutionally excessive and therefore amounts to punishment in violation of the Due Process Clause. *Id.* at 541 n.23, 548 and 562.

Although the Court in *Wolfish* did not apply this standard to invalidate any of the practices at issue in that case,[14] numerous federal courts have utilized the standard since *Wolfish* to remedy a variety of unconstitutional jail conditions. See, *e.g.*, *Malone* v. *Colyer*, 710 F.2d 258 (6th Cir. 1983); *Logan* v. *Shealy*, 660 F.2d 1007 (4th Cir. 1981); *Villanueva* v. *George*, 659 F.2d 851 (8th Cir. 1981) (en banc); *Lareau* v. *Manson*, 651 F.2d 96 (2nd Cir. 1981), *modifying and affirming*, 507 F.Supp. 1177 (D. Conn. 1980); *Lock* v. *Jenkins*, 641 F.2d 488 (7th Cir. 1981); *Jones* v. *Diamond*, 636 F.2d 1364 (5th Cir. 1981) (en banc); *Campbell* v. *Cauthron*, 623 F.2d 503 (8th Cir. 1980); *Fischer* v. *Winter*, 564 F.Supp. 281 (N.D. Cal. 1983); *Martino* v. *Carey*, 563 F.Supp. 984 (D. Ore. 1983); *Campbell* v. *McGruder*, 554 F.Supp. 562 (D.C.D.C. 1982); *Boudin* v. *Thomas*, 533 F.Supp. 786 (S.D.N.Y. 1982); *McMurry* v. *Phelps*, 533 F.Supp. 742 (W.D. La. 1982); *Dawson* v. *Kendrick*, 527 F.Supp. 1252 (S.D. W.Va. 1981); *Vazquez* v. *Gray*, 523 F.Supp. 1359 (S.D.N.Y. 1981); *Benjamin* v. *Malcolm*, 495 F.Supp. 1357 (S.D.N.Y. 1980). As the Seventh Circuit declared in *Lock* v. *Jenkins*, *supra*, 641 F.2d at 498:

> We do not read anything in *Wolfish* as requiring this court to grant automatic deference to ritual incantations by prison officials that their actions foster the goals of order and discipline.

This sensitivity has been especially acute in cases involving jails which, unlike the one at issue in *Wolfish*, are traditional

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[14] The specific issue in the instant case—contact visitation—was not before the Court in *Wolfish*. The Court expressly stated that it intimated no view with respect to that issue. *Id.* at 560 n.40.

jails of traditional design. The facility in *Wolfish* was unique in that it "differs markedly from the familiar image of a jail; there are no barred cells, dank, colorless corridors, or clanging steel gates." 441 U.S. at 525; *id.* at 544 n.27. The institution in this case, on the other hand, is very much the "familiar image of a jail." Indeed, on original submission the district court held that

> Both from the testimony at the trial and from my personal inspection of the cell rows . . . it is apparent to the court that the multiple occupancy cells in both the 'old' and new sections of the jail and the general atmosphere in which they are located present poor examples of the civilized standards and concepts of dignity, humanity and decency to which Mr. Justice Blackmun made reference in *Jackson* v. *Bishop*, *supra*. The cells are much like those in the Hall of Justice Jail, as I pointed out in *Dillard* v. *Pitchess*, 399 F.Supp. 1225, 1231 (C.D. Cal. 1975), a case in which the living conditions there were held to be intolerable.

(P.A. 46).[15] In cases involving such jails, courts have been particularly careful to scrutinize detainees' claims that the conditions of their confinement amount to punishment under the *Wolfish* standard. See, *e.g.*, *Lareau* v. *Manson*, *supra*, 651 F.2d at 103-04 (2nd Cir. 1981); *McMurry* v. *Phelps*, *supra*, 533 F.Supp. at 762 (W.D. La. 1982); *Benjamin* v. *Malcolm*, *supra*, 495 F.Supp. at 1364 (S.D.N.Y. 1980). As one member of the *Wolfish* majority recently stated in a related context:

> [I]ncarceration is not an open door for unconstitutional cruelty or neglect. Against that kind of penal condition, the Constitution and the federal courts, it is to be hoped, together remain as an available bastion.

Rhodes v. *Chapman*, 452 U.S. 337, 369 (1981) (concurring opinion of Justice Blackmun).

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[15] The defendants did not appeal nine of the trial court's original injunctive provisions such as providing every prisoner with a bed. See n.1, *supra*.

B. Total Prohibition Of Contact Visitation For Detainees Of The Los Angeles County Jail And Their Families Would Be Psychologically Harmful, Punitive In Effect, And Constitutes An Exaggerated Response To Security Problems.

In *Wolfish*, this Court indicated that "genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amount to punishment. . . ." 441 U.S. at 542. The harsh psychological effects of barrier visits, which one leading case found to be "inhumane and cruel in fact," *Rhem* v. *Malcolm*, 371 F.Supp. 594, 626 (S.D.N.Y. 1974), *aff'd*, 507 F.2d 333, 338 (2nd Cir. 1974), raise precisely those questions of privation and hardship. See also, *Jones* v. *Diamond*, *supra*, 636 F.2d at 1377 (deprivation of detainees' rights "to personal contact with their family and loved ones, to touch and hold their children and spouses" is a "serious" deprivation).

The trial court found that the ability to embrace wives and children "is a matter of great importance" to pretrial detainees confined one month or more (P.A. 48) and that the deprivation of such visits is "very traumatic treatment" (P.A. 25). A number of experts at the trial testified to the importance, from a mental health point of view, of contact familial visits.[16] And, in the instance of pre-verbal children, the denial of physical contact is tantamount to no visitation at all. *Boudin* v. *Thomas*, 533 F.Supp. 786, 793 (S.D.N.Y. 1982). Many mental health professionals assert that barrier visitation, by placing a loved one in extremely close proximity (i.e., only a few inches away), yet denying any physical contact, is extremely frustrating and tortuous to many prisoners. *Rhem* v. *Malcolm*, *supra*, 371 F.Supp. at 602-3.

Petitioners' across-the-board prohibition against contact visitation is an exaggerated, punitive response demanding judicial relief. It denies contact visitation without regard to

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[16] See statement of facts, *supra* at pp. 7-8.

differences between individual pretrial detainees. Although the average period of detention for persons booked into the Central Jail and held more than 24 hours is 10.9 days (R.T. 21:4456-7), on any given day fully 75% of the jail's population is facing three months or more of incarceration pending resolution of felony charges (R.T. 21:4463, 4537). Obviously, the deprivations suffered by detainees facing months in the jail are of an entirely different magnitude than that of short-term detainees. See Kupers, R.T. 22:4663-4. *Wolfish*, 441 U.S. at 544; *Hutto* v. *Finney*, 437 U.S. 678, 686-7 (1978); *Lock* v. *Jenkins*, *supra*, 641 F.2d at 494-495; *Campbell* v. *Cauthron*, *supra*, 623 F.2d 507; *Lareau* v. *Manson*, 651 F.2d 96, 105 (2nd Cir. 1981).

Similarly, petitioners ignore vast differences in prisoners' propensities to escape or use drugs in the jail, propensities which petitioners have the means of identifying (P.A. 48, P.A. 33; R.T. 22:4527-8, 4532, 4584-5, 4632, 3:1981). Defendants proceed on the unfounded assumption that all detainees threaten jail security and thereby abridge detainees' rights "to be considered individually to the extent security and space requirements permit." *Jones* v. *Diamond*, 636 F.2d 1364, 1374 (5th Cir. 1981) (en banc). As the Court in *Lock* v. *Jenkins*, *supra*, stated with regard to certain detainees, known as safekeepers, who were transferred to and sequestered within an Indiana State Prison for reasons as varied as being dangerous or being endangered:

> The very fact that the prison officials have not undertaken a classification process regarding the safekeepers or otherwise discovered their needs or their reasons for being sent to the prison makes it impossible for the prison officials to know what restrictions on each safekeeper are necessary to preserve internal order and effectively manage the institution.

Id., 641 F.2d at 497.

In addition, denial of contact visitation has punitive overtones. In California state prisons, where approximately 80% of the population is permitted contact visitation (R.T. 22:4587),

withdrawal of visitation privileges is used as a "stick" to control behavior (R.T. 22:4589, 4624).[17] As established in *Wolfish*, and *Kennedy* v. *Mendoza-Martinez*, *supra*, such punitive use of contact visitation privileges in the field of corrections is an important factor in determining whether petitioners are moved by an unacceptable intent to punish.

In the instant case, defendants have not made any showing that the level of deprivations suffered by the limited group of low-risk detainees who are the target of the district court's order—those held 30 days or longer—is necessary to any significant state interest. The detainees who benefit by the district court's order suffer injuries to their right of association and their well-being for an extended period of time, three months or more (R.T. 22:4463, 4537), and have no alternative means of obtaining the human warmth necessary to mental health and family lives (Kupers, R.T. 22:4647-51).

Further, the district court properly found that there are available to defendants effective security precautions, commonly used in correctional institutions, such as classification, construction of a specially secured visiting facility, searches of prisoners, metal detectors, fluoroscopes, inspection or exclusion of visitors' parcels, identification of visitors, searches of visitors and visual observance (R.T. 20:4164-6, 4232, 22:4575-7, 4584-5, 4601), which will provide adequate protection to the integrity of the facility.

Two important circumstances coalesce in this case to show that defendants' claimed security needs do not provide a sufficient justification for denying contact visits to detainees. First, the petitioners inadvertently acknowledge that such visits can be conducted safely. Lt. Lonergan testified that 70% of the jail's detainees are identified in three weeks (R.T. 21:4529-30), and, as noted above, that only a speedier identification system and the absence of appropriate physical facilities stand in the

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[17] See also, *In re French*, 106 Cal.App.3d 74, 164 Cal.Rptr. 800 (1980); and *In re Bell*, 110 Cal.App.3d 818, 168 Cal.Rptr. 100 (1980).

way of contact visitation at the Central Jail (R.T. 21:4531-2). In this regard, it is worth noting the findings of the court in *Jones* v. *Wittenberg*, 509 F.Supp. 653, 699 (N.D. Ohio 1980), that a court-ordered contact visitation program implemented within the Lucas County (Toledo), Ohio jail "has proved to be far more successful than many people had thought . . . in reducing the tension level of the inmate . . . [and in being] secure." See also, *McGoff* v. *Rapone*, 78 F.R.D. 8 (E.D. Pa. 1978) (contraband entered jail in only a tiny fraction of one per cent of all contact visits during a period of more than three years).

Second, it is undisputed that contact visitation is the norm in prisons and is a growing practice in detention facilities. To briefly highlight the evidence: contact visitation is enjoyed by about 80% of the inmates in California state prisons (R.T. 22:4587), all pretrial detainees in the Federal Bureau of Prisons (Lumpkin Depo. 7-8, 13-14, R.T. 5:1955), all except identifiably dangerous detainees in New York City Jails (R.T. 20:4339, 4362); nationwide, exclusion of convicts from contact visitation is very rare (R.T. 20:4159); and both the National Sheriffs' Association (R.T. 20:4189) and the American Correctional Association (R.T. 20:4191) have established standards requiring that pretrial detainees be permitted to have contact visits.[18] In the face of this evidence, petitioners cannot seriously contend (Br., 20) that plaintiffs are attempting to impose the sort of "lowest common denominator" practice disapproved by *Wolfish*. Rather, this evidence of the overwhelming practice in the corrections field establishes petitioners' exaggerated response to security problems.

C. The District Court's Orders Must Be Assessed In The Context Of The Totality Of Conditions Extant At The Jail.

The orders challenged in this appeal must be examined in the context of the totality of the debilitating, oppressive conditions at the Central Jail.

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[18] In *Wolfish*, this Court noted that professional standards may be "instructive." 441 U.S. at 543, n.27.

As this Court noted in holding that various conditions in the Arkansas penal system constituted cruel and unusual punishment in violation of the Eighth Amendment, "The order is supported by the interdependence of the conditions producing the violation." *Hutto* v. *Finney*, 437 U.S. 678, 688 (1978). Accord, *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981). Consequently, this Court must consider the totality of circumstances at the Central Jail prior to the issuance of the trial court's order and must view the challenged conditions at issue in this appeal as part of a larger policy denying respondents their constitutional rights in violation of *Wolfish*.

An examination which takes into account the totality of conditions at Central Jail is consistent with the approach of this Court in *Wolfish*, which took notice of the totality of conditions prevalent at the Metropolitan Correctional Center (MCC), the federally-operated, short-term custodial facility which was the subject of that litigation. This Court found that the MCC "differs markedly from the familiar image of a jail; there are no barred cells, dank, colorless corridors or clanging steel," 441 U.S. at 525; and in distinguishing lower court cases where the failure to provide minimum space requirements was found to be a constitutional violation, this Court noted the "factual disparity" between those "traditional jails and cells in which inmates were locked during most of the day" and the MCC facility, 441 U.S. at 543, n.27. As noted by the *Wolfish* trial court, the MCC facility was "markedly divergent from the bestial traditions of the American jail," containing carpeted common areas with color television sets, couches, chairs, tables, telephones, mail boxes, exercise equipment, typewriters, laundry facilities, water fountains, education areas and pantries with microwave ovens." *U.S. ex rel. Wolfish* v. *Levi*, 439 F.Supp. 114, 119-121 (S.D.N.Y. 1977). All the cells included windows facing the outside world. *Id.* at 121. MCC also had a rooftop recreation area equipped for basketball, paddleball and handball, to which all inmates had access one hour each day. *Id.* MCC contained no centralized commissary; precooked meals were brought on trays to inmates in the common

areas where food could be reheated in the microwave ovens and consumed at leisure. *Id.*

The trial court's findings here supporting the orders which petitioners challenge cannot be understood without examining related conditions. Most generally, the Los Angeles County Central Jail is a much older facility (J.A. 70). Its inmates, who are housed in traditional cell blocks (P.A. 45-6), have nowhere near the degree of freedom available at the MCC, where inmates housed in "modular units" had free access to a multipurpose room, balcony education area, and recreation for 16 to 19 hours per day. *Wolfish* v. *Levi*, 573 F.2d 118, 121 (2nd Cir. 1978).[19]

Considered in the light of these and other aggravating conditions, the challenged orders are minimal intrusions carefully selected and designed to alleviate the excessive deprivations extant within the Central Jail.

II. TOTAL PROHIBITION OF CONTACT VISITATION AT THE LOS ANGELES COUNTY JAIL INTERFERES WITH THE CONSTITUTIONALLY PROTECTED FAMILIAL RIGHTS OF DETAINEES AND THEIR FAMILIES.

A. Constitutionally Protected Familial Rights Are Impaired By The Denial Of Contact Visitation.

In *Bell* v. *Wolfish*, *supra*, 441 U.S. at 534-35, the Court specifically noted that it was not dealing with those fundamental liberty interests delineated in cases such as *Roe* v. *Wade*, 410 U.S. 113 (1973); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); and *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). However, the issue in the instant case implicates the very fundamental interests alluded to in *Wolfish*.

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[19] See also, the discussion at p. 3, *supra*, and n.1, *supra*.

The visiting system in the Los Angeles County Jail strikes at the most basic aspect of the family: the way family members relate to each other. Interposing a barrier between the detainee and his visitor makes it impossible for the detainee to kiss his child, to touch his wife, or to embrace his mother and father. Instead of physical closeness during a time of crisis, the detainee and his family are reduced to staring at each other across a barrier which precludes any meaningful communication.

The family relationship is as "old and fundamental as our civilization." *Griswold* v. *Connecticut*, *supra*, 381 U.S. at 496 (concurring opinion of Justice Goldberg). Marriage, the foundation of the family, has been characterized as the most important relationship in life. *Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978). Because of the special importance of these relationships, the Court has "long recognized" the protected nature of "matters of marriage and family life," *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 639-40 (1974); *Moore* v. *City of East Cleveland*, 431 U.S. 494, 499 (1977), and has acted to protect them.

The Court has been especially solicitous of the rights of parents with respect to their children. *Stanley* v. *Illinois*, *supra*; *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer* v. *Nebraska*, *supra*. These rights apply with no less force to pretrial detainees who, as a result of their incarceration for inability to post bail, have been forcibly separated from their children. "[W]hen blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982).

While no previous case in this Court dealt with the aspect of the familial rights at issue here, that does not obviate the application of these principles to the instant case:

> To be sure, these cases did not expressly consider the family relationship presented here. They were immediately concerned with freedom of choice with respect to

> child-bearing, e.g., *LaFleur*, *Roe* v. *Wade*, *Griswold*, *supra*, or with the rights of parents to the custody and companionship of their own children, *Stanley* v. *Illinois*, *supra*, or with traditional parental authority in matters of child rearing and education. *Yoder*, *Ginsberg*, *Pierce*, *Meyer*, *supra*. But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to . . . this case.

Moore v. *City of East Cleveland*, *supra*, 431 U.S. at 500-01; see also *Zablocki* v. *Redhail*, *supra*, 434 U.S. at 385. Indeed, several cases that have addressed this argument for contact visits have held that contact visits are required. *Cooper* v. *Morin*, 49 N.Y.2d 69, 399 N.E.2d 1188, 434 N.Y.S.2d 168 (1979);[20] *Wesson* v. *Johnson*, 579 P.2d 1165 (Colo. 1978) (en banc). See also *Wolfish* v. *Levi*, 573 F.2d 118, 126 n.16 (2nd Cir. 1978) (First Amendment associational right); *Boudin* v. *Thomas*, 533 F.Supp. 786, 792-93 (S.D.N.Y. 1982).

Forcing detainees and their families to visit through physical barriers unduly interferes with the "private realm of family life." *Moore* v. *City of East Cleveland*, *supra*, 431 U.S. at 499. As the court noted in *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 844 (1977):

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association and from the role it plays in "promot[ing] a way of life" . . . *Wisconsin* v. *Yoder*, 406 U.S. 205, 231-233 (1972).

To prevail under this well-established body of constitutional law, plaintiffs do not have to prove that the denial of contact visitation necessarily has a permanent or irreparable impact upon family ties in all instances. For example the regulation

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[20] While *Cooper* was decided as a matter of state constitutional law, it relied solely on federal cases dealing with familial rights.

invalidated in *Cleveland Board of Education* v. *LaFleur*, *supra*, did not prevent teachers from bearing children; it simply placed a "heavy burden" upon the exercise of that right (414 U.S. at 639). The statute at issue in *Zablocki* v. *Redhail*, *supra*, did not necessarily prevent all persons affected from marrying, but it did constitute a "serious intrusion" (434 U.S. at 387) into that subject; the fact that it "significantly interfere[d]" (*id.* at 388) with a fundamental right was sufficient for it to be struck down. The ordinance invalidated in *Moore* v. *City of East Cleveland*, *supra*, only affected family relationships in one small neighborhood of an extensive metropolitan area (431 U.S. at 550) (dissenting opinion of Justice White), and even there was by no means absolute (*id.* at 540-41) (dissenting opinion of Justice Stewart).

Plaintiffs hardly have to prove an increase in the divorce rate of prisoners at the Los Angeles County Jail, any more than plaintiffs in *LaFleur* had to prove an actual reduction in their birth rate or plaintiffs in *Moore* had to prove an outright dissolution of their family ties. It is sufficient to prove that barrier visiting severely weakens and interferes with the maintenance of family relationships. The record below amply demonstrates that it does.[21]

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[21] See also the many authorities cited by the New York Court of Appeals in *Cooper* v. *Morin*, *supra*, 49 N.Y.2d at 80-81, 424 N.Y.S.2d at 175: "The detrimental effect upon spousal and parent-child relationships of the denial of contact, if not obvious, is attested to . . . by . . . numerous books and articles (see McGowan & Blumenthal, *Why Punish The Children: A Study of Children of Women Prisoners;* Schwartz & Weintraub, *The Prisoner's Wife: A Study in Crisis*, 38 Fed.Prob. No.4, 20; Zemans and Cavan, *Marital Relationships of Prisoners*, 49 J.Crim.L. and Criminology 50; Simpson, *Conjugal Visiting in United States Prisons*, 10 Col. Human Rights L.Rev. 643; *Note, On Prisons and Parenting: Preserving the Ties*, 87 Yale L.J. 1408; Karten, *Mothers Behind Bars—What Happens To Their Children*) . . ."

Additionally, a plethora of scientific documentation shows that an integral part of parenting, and of the nurture that a child needs, is the comfort and reassurance that close, loving physical contact with a parent, including fathers, provides.[22] If anything, the child's need to be touched and held by his or her absent parent increases when the child is deprived of that parent's accustomed presence during the period of incarceration.[23] One district court has recently noted that an infant child "cannot yet respond solely to visual contact" with its parents. *Boudin* v. *Thomas*, *supra*, 533 F.Supp. at 793. In such cases contact visitation must be permitted, because "no

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[22] For a general review of the early studies on the effects of father absence on children, see McCandles, *Children, Behavior and Development* 162-68 (2nd. Ed. 1967). One of the studies found that:

> Five year-olds who lack consistent father figures in the home almost desperately seek attention from any male they can find who gives them so much as a nod.

Id. at 166.

[23] Michael Lamb's recent studies on interaction between fathers and their young children and infants indicate that the infant's attachment to his father and to his mother is equally strong. Lamb, "Father-Infant and Mother-Infant Interaction in the First Year of Life," 348 *Child Development* 167, 168 (1977). From the very beginning of life an infant "attaches" to parents based on various stimuli including "the tactile and kinaesthetic stimuli arising from human arms and body." J. Bowlby 1 *Attachment and Loss, Attachment* 255 (1969); Ainsworth, "Individual Differences in Some Attachment Behaviors," 18 *Merrill-Palmer Quarterly* 123 (1972). Lamb's results showed no preference for either parent in the attachment behavior; infants fussed to and were soothed by their fathers as often as their mothers. *Id.* at 177, 179. Lamb concluded

> that infants are attached to both their parents from the beginning of attachment relations . . . the nature of the mother-infant and the father-infant interaction . . . [is] that infants develop different expectations and learn different behavior patterns from each parent and thus that the two relationships have differential consequences for socio-personality development. Developmental psychologists have long believed that mothers and fathers play different roles in the socialization of older children

alternatives to communication with infants by touch are available." *Ibid.* In short, a barrier visit between a detainee and his or her infant child or family is tantamount to no visit at all. The barrier does not merely render the visit frustrating and punishing, but rather totally deprives the detainee parent and the infant of the right to visit with each other.

B. Analyzed Under The Strict Standard Applicable To Deprivations Of Familial Rights, Total Prohibition Of Contact Visitation At The Los Angeles County Jail Violates The Due Process Rights Of Detainees And Their Visitors.

In *Bell* v. *Wolfish*, *supra*, the Supreme Court dealt with various aspects of the confinement of pretrial detainees. Not all of these were analyzed in precisely the same manner. Rather, it was the particular nature of the claimed interest affected by the condition or practice which controlled the nature of the constitutional analysis. For example, in discussing the double-celling issue, the Court noted that "the detainee's

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and the data indicate that these differential roles may be continuous from early infancy.

Id. at 179. *Accord*, Lamb, "Fathers: Forgotten Contributors to Child Development," 18 *Human Development* 243, 246, 260 (1975).

Related earlier studies indicated that physical contact between mother and infant is innately gratifying or rewarding. P. H. Mussen, J. J. Conger and Kagen, *Child Personality and Development* 154 (1974). The literature also suggests a high correlation between deprivation of such contact and chronic tension and gastrointestinal disorders even in very young infants. Holding and handling by the attachment figures may be essential for the child's proper development. Ribble, *Infantile Experiences in Relation to Personality Development* (Hunger, 1944).

Moreover, the inmate needs to be able to touch other family and close friends. The primary attachments formed in infancy affect later secondary attachments. See Lamb, *supra*, 348 *Child Development* at 183. See also Huss, *Touch with Care or a Caring Touch*, 31 Amer.J. of Occ. Ther., 11, 15 (1977).

desire to be free from discomfort . . . does not rise to the level of those functional liberty interests delineated in such cases as *Roe* v. *Wade*, 410 U.S. 113 (1973). . . ." *Bell* v. *Wolfish*, *supra*, 441 U.S. at 534-35. Accordingly, it proceeded to analyze the double-celling issue as a matter of punishment. In contrast, the application of the "publisher only" rule was analyzed under the First Amendment. *Id.* at 549-53. The Court not only looked to the principles regarding the application of the First Amendment in the prison context, *id.* at 550-51, but also engaged in traditional First Amendment analysis with regard to the neutrality of the restriction (i.e., it was without regard to the content of the expression), and the alternative means of obtaining reading material. *Id.* at 551-52. Similarly, the cell shakedown and body cavity search issues were analyzed under the Fourth Amendment. *Id.* at 555-60.

Because the restriction at issue in this case impinges on fundamental familial rights, this Court is required to entertain a more careful scrutiny of the balance between the interests involved. *Procunier* v. *Martinez*, 416 U.S. 396 (1974) (First Amendment right to correspondence). This scrutiny must be all the more exacting because the rights of third parties are also involved: the wives, husbands, children and parents of those incarcerated. *Id.* at 407-09. As Justice Powell's opinion for the Court in *Procunier* recognizes, an issue such as the constitutionality of restrictive mail or visiting regulations "implicates much more than the rights of prisoners." *Id.* at 408. Since the rights of unincarcerated persons are involved, and since fundamental values are at stake, the *Procunier* test controls:

> First, the regulation or practice in question must further an important or substantial governmental interest. . . . Second, the limitation . . . must be no greater than is necessary or essential to the protection of the particular governmental interest involved.

Id. at 413. See *Kincaid* v. *Rusk*, 670 F.2d 737, 743-45 (7th Cir. 1982) (First Amendment right of access to books, magazines and newspapers); *Parnell* v. *Waldrep*, 511 F.Supp. 764, 767-69 (W.D.N.C. 1981) (same); cf. *Logan* v. *Shealy*, 660 F.2d 1007,

1013 (4th Cir. 1981) (Fourth Amendment right to be free from unreasonable searches and seizures).

Under this standard, defendants cannot conceivably justify the total prohibition on contact visiting at the Los Angeles County Jail. The complete elimination of all opportunity for all detainees to touch, hold and embrace their loved ones and especially their infant children is obviously "greater than is necessary or essential to the protection of the governmental interest involved." *Procunier* v. *Martinez*, *supra*, 416 U.S. at 413.

III. THE DISTRICT COURT'S ORDER THAT DETAINEES BE ALLOWED TO OBSERVE SEARCHES OF THEIR CELLS PROPERLY REMEDIES DEPRIVATIONS OF DETAINEES' PROPERTY WITHOUT DUE PROCESS OF LAW.

The district court's order requiring that detainees present in the vicinity of their cellblock be given the opportunity to observe searches of their cells and property is a narrowly tailored remedy that interposes minimal procedural safeguards against the arbitrary confiscation and destruction of detainees' property established by the testimony of prisoners and officers alike. See, e.g., the testimony of deputy sheriffs Ortiz (R.T. 10:2871) and McEntire (R.T. 11:2948-9).

In challenging the district court's order on cell search procedures, petitioners rely exclusively on this Court's holding in *Wolfish*, that the policy there of refusing pretrial detainees the right to contemporaneously observe searches of their cells does not violate the Fourth Amendment's ban against unreasonable searches and seizures. (Pet. Br. at 24-29). The holding in *Wolfish*, however, is not dispositive of that issue in this case.

It is clear that the trial court was interested in insuring that pretrial detainees not be deprived of their "meager possessions" without due process of law (P.A. 36).

> Due process, after all, means fair treatment under the circumstances. I believe that to allow these prized posses-

> sions to be confiscated under subjectively enforced regulations, without giving the possessor any opportunity to explain or protest or entreat, deprives him of his property without due process of law. (P.A. 28).

Since this Court has never addressed the denial of contemporaneous observation of cell searches as an infringement of pretrial detainees' due process rights, the specific and limited holding of *Wolfish* on the cell search issue is inapposite, particularly in light of the limited order here.[24]

Moreover, in a later decision, *Parratt* v. *Taylor*, 451 U.S. 527 (1981), this Court indicated that due process guarantees apply to the taking of prisoners' property. There in the context of holding that state court damage remedies for the negligent loss of an inmate's property satisfy the requirements of due process, the Court held that a hearing is required sometime before the state permanently deprives a prisoner of his property interests.

> Our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interests. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.

Id., 451 U.S. at 540 (citation omitted).

The Court went on to find that a post seizure damage action was an adequate remedy in that the taking there at issue was "random and unauthorized" and the property irretrievable. *Id.*, 451 U.S. at 541.

In contrast, the property seizures challenged here are conducted pursuant to established jail procedures; and a post-seizure, in-jail procedure would be virtually impossible to

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[24] The Court may address related issues in a presently pending case. See *Hudson* v. *Palmer*, 82-1630 and *Palmer* v. *Hudson*, 82-6695, ruling below, 697 F.2d 1220 (4th Cir. 1982), argued on December 7, 1983.

implement. Moreover, the seized items have a value to detainees well beyond their monetary cost (P.A. 28).

Petitioners' analysis also ignores the previously discussed distinctions between the MCC (the subject of the *Wolfish* litigation) and the Central Jail. There is no evidence in this record comparable to the expert testimony offered in *Wolfish* that "permitting inmates to observe room inspections would lead to friction between the inmates and security guards and would allow the inmates to attempt to frustrate the search by distracting personnel and moving contraband from one room to another ahead of the search team." *Wolfish, supra*, 441 U.S. at 555. Rather, the only testimony cited by petitioners which supports the prohibition of contemporaneous observation of cell searches (Pet. Br. at 30) is the speculation of Margaret Lombardi, a deputy sheriff for four years with no apparent expertise in security matters (R.T. 19:4113-4). Unlike *Wolfish*, no correctional expert testified convincingly here that permitting the contemporaneous observation of cell searches would present an imminent danger to the security of the facility. *Wolfish, supra*, 441 U.S. 555, n.36.

Moreover, many of the problems which petitioners foresee arising from the contemporaneous observation of cell searches are solved by the district court's adoption of "Method C," a procedure by which a row of cells is vacated, all prisoners taken to the dayroom, and are returned cell-by-cell to observe the searches of their quarters. (P.A. 35, R.T. 19:4124). This cell search procedure was one of four methods which the Sheriff's Department had itself designed and tested (R.T. 19:4122-24), and was the procedure, other than petitioners' original procedure, which could be safely implemented with the fewest number of deputies (Hearing Exhibit B). Thus, the procedure required by the district court's order is neither novel, nor untested, nor infeasible. Indeed, summarizing the results of the searches conducted under "Method C," Deputy Lombardi could detect only two problems. First, she speculated about the bizarre possibility of an inmate or an officer falling over a railing to the bottom tier when searches of upper-tier cells

were conducted (R.T. 19:4132-2). However, there is no indication in the record that this problem is any more serious at the time of cell searches than at any other time when officers remove prisoners from their cells on the upper tier.

Deputy Lombardi's second concern was that "the inmates did not care for that type of search . . . being forced to stand there and observing the officers going through their property" (R.T. 19:4133). However, this claim is controverted by the trial judge's own conversations with inmates whose "ready responses were that they preferred to be present so that they could see what was going on, and in order that they might seek to explain why certain questioned items should not be removed." (P.A. 36)[25] Indeed, during the trial judge's observation of the actual cell searches, he noted that a deputy sheriff reconsidered two decisions to remove certain magazines from a cell after the prisoner offered an explanation (P.A. 36).

In the instant case, petitioners' cell search procedure was not enjoined as unconstitutional *per se* but rather as being conducted in a manner abusive to detainees' property rights. Therefore, *Bell* v. *Wolfish* does not control the resolution of the precise issues at bar. The district court's determination that denying detainees at the Jail all opportunities to contemporaneously view the searches of their cells is an exaggerated response to over-inflated security concerns and its adoption of "Method C" is a reasonable means of assuring that plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment are adequately protected.

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[25] A third concern cursorily referenced by Deputy Lombardi (R.T. 19:4116) and now relied upon by petitioners (Pet. Brief at 30), is that detainees would learn where to hide contraband if they were allowed to watch searches of their cells. However, Deputy Lombardi failed to explain the basis of this bald conclusion and omitted this concern from her testimony summarizing petitioners' criticisms of "Procedure C" (R.T. 19:4132-33).

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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